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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 812

JULIUS BLACK, ADMINISTRATOR OF THE ESTATE OF DAVID VICTOR BLACK,

Petitioner,

UNITED STATES OF AMERICA and MATHIASEN'S TANKER INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

In the Matter of the Petition of the UNITED STATES OF AMERICA and MATHIASEN'S TANKER INDUSTRIES, INC., for exoneration from or Limitation of Liability as owners of the USNS MISSION SAN FRANCISCO

JULIUS BLACK, ADMINISTRATOR OF THE ESTATE OF DAVID VICTOR BLACK,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Administrator of the Estate of David Victor Black, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered 12 September 1966, modifying the judgment of the United States District Court for the District of Delaware, entered 17 December 1964.

Opinion Below

The opinion and supplemental opinion of the United States District Court for the District of Delaware are reported at 236 F. Supp. 895 and 909. The opinion of the United States Court of Appeals for the Third Circuit has not been reported and is printed *infra*, pp. 1a-13a.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on 12 September 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

I. Whether the Suits in Admiralty Act, 46 U. S. C. §§ 741-752, bars a seaman's claim under the Jones Act, 46 U. S. C. § 688, against his employer, the owner *pro hac vice,* who hired him and exercised immediate control over him pursuant to a contract with the United States which expressly provided that he was not an employee of the United States.

II. Whether a seaman's recovery under the Jones Act, 46 U. S. C. § 688 against his employer for loss to dependents is a bar to an independent claim under the Delaware Wrongful Death Act, 10 Del. Code § 3704(b), against the United States of America for the loss to decedent's estate.

Statutes Involved

Jones Act, 46 U. S. C. § 688.

Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any

such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (41 Stat. 1007).

Suits in Admiralty Act, 46 U. S. C. § 745.

745. Causes of Action for Which Suits May be Brought; Limitations; Exceptions; Actions Which May Not Be Revived; Interest on Claims.

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such

claim is brought as authorized by Section 742 of this Title unless upon a contract expressly stipulating for the payment of interest. (64 Stat. 1112).

Delaware Wrongful Death Act, 10 Del. Code § 3704 (b)

Whenever death is occasioned by unlawful violence or negligence, and no suit is brought by the party injured to recover damages during his or her life the widow or widower of any such deceased person, or, if there is no widow or widower, the personal representative, may maintain an action for and recover damages for the death and loss thus occasioned.

Statement

This action was initiated by the United States of America and Mathiasen's Tanker Industries, Inc., (hereinafter Mathiasen) jointly filing a petition for exoneration from or limitation of liability as the owner and bareboat charterer respectively of the USNS MISSION SAN FRANCISCO.

The USNS MISSION SAN FRANCISCO and the SS ELNA II collided in the Delaware River on 7 March 1957. The MISSION SAN FRANCISCO was totally destroyed with a loss of ten lives including petitioner's decedent, David Victor Black, the vessel's radio operator. The owner of the SS ELNA II, Oskar Tiedemann and Company, filed a petition for exoneration or limitation which was consolidated for trial with the petition of the United States and Mathiasen.

The right of the United States and Mathiasen to petition jointly was sustained by the United States District Court for the District of Delaware on 7 October 1957. 155 F. Supp. 714. The district court's opinion was affirmed by the Court of Appeals for the Third Circuit on 26 Sep-

tember 1958. 259 F. 2d 608. After a trial on the merits the MISSION SAN FRANCISCO and the ELNA II were found at fault. The petition of the United States and of Mathiasen for exoneration or limitation was denied. The owner of the ELNA II was granted limitation of liability. 179 F. Supp. 227, *aff'd.* 289 F. 2d 237.

The district court appointed a commissioner to ascertain the damages. The commissioner awarded the petitioner (1) damages against Mathiasen under the Jones Act in the amount of $26,575 and (2) damages against the United States under the Delaware Wrongful Death Act in the amount of $36,135. The district court approved the commissioner's awards and directed that prejudgment interest be allowed in the Jones Act award against Mathiasen. A decree was entered against the United States and Mathiasen on both awards on 17 December 1964 pursuant to an opinion of the court dated, 23 September 1964 and a supplemental opinion of the court, dated 16 December 1964. These opinions are reported at 236 F. Supp. 895 and 909.

The United States and Mathiasen appealed from the decree of the district court to the Court of Appeals for the Third Circuit. On appeal the district court's judgment was modified by eliminating all recoveries allowed against Mathiasen and eliminating the award to petitioner against the United States under the Delaware Wrongful Death Act and substituting instead a Jones Act award against the United States. The Court of Appeals said:

> "While in the circumstances of this case the determination of the proper Jones Act respondent is not free from doubt, we have concluded that the United States is liable to Black's estate and to the others similarly situated under the Jones Act. Difficulty arises because Jones Act recovery is normally al-

> lowed only against the complaining seaman's employer, and in this case Mathiasen hired the crewmen and exercised immediate control over them pursuant to a contract with the United States which specified that the members of the crew would be employees of Mathiasen and not of the United States." (*infra*, 10a-11a).

The opinion of the Court of Appeals has not been reported. It is set forth *infra* pp. 1a-13a.

On or about 1 July 1953 Mathiasen entered into a contract with the Military Sea Transport Service (hereinafter M. S. T. S.) for the bareboat charter of certain vessels owned by the United States, including the MISSION SAN FRANCISCO. Under the M. S. T. S. contract the master, officers and crew are expressly stated to be employees of the Contractor and not of the United States. (R*. 70a, 90a). The M. S. T. S. contract further provides that the United States is to reimburse the contractor for the satisfaction of judgments rendered against it arising out of the death of a member of the crew. (R. 89a).

The United States and Mathiasen were found at fault. Mathiasen was negligent in the navigation and operation of the vessel. The United States was negligent in permitting the vessel to sail without the proper equipment to cleanse the vessel's tanks of the highly inflammable gases which had accumulated. 179 F. Supp. 227, *aff'd.* 289 F. 2d 237.

The Court below declared that Mathiasen is an "agent" of the United States within the meaning of the Suits in Admiralty Act, 46 U. S. C. § 745. It substituted the United States as the employer of the deceased seaman Black. It struck the recovery against the United States under the Delaware Wrongful Death Act. It eliminated the prejudgment interest on the Jones Act award from 7 March 1957.

R* refers to Appellants' Appendix in the United States Court of Appeals for the Third Circuit.

Reasons for Granting the Writ

The decision of the Court below is inconsistent with the decisions of this Court in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783 (1949) and *Powell* v. *U. S. Cartridge Co.,* 339 U. S. 497 (1950). It conflicts with the decisions of the Court of Appeals for the Second Circuit in *Hanlon* v. *Waterman Steamship Corporation,* 265 F. 2d 206 (1959) and with the decision of the Court of Appeals for the Fifth Circuit in *Atlantic Coast Line R. Co.* v. *Agwilines, Inc.,* 195 F. 2d 459 (1952).

In *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783 (1949), this Court considered the Government's General Agency Agreement. [hereinafter G. A. A.]. The seaman sought a Jones Act award against the General Agent, Cosmopolitan Shipping Company. Previously, this Court had held that a Jones Act claim may only be brought against the claimant's employer. *Lindgren* v. *United States,* 281 U. S. 38 (1930). In denying the Jones Act claim against the General Agent, Cosmopolitan Shipping Company, this Court found that pursuant to terms of the G. A. A. contract the claimant's employer was the United States. The decision in *Cosmopolitan* was codified in the 1950 amendment to the Suits in Admiralty Act, 46 U. S. C. § 745. The Court below said that Section 745 of the act bars any Jones Act claim against Mathiasen. In *Cosmopolitan,* this Court declared that the master and crew were employees of the United States, 337 U. S. at 785, 786. The decision of the Government to have crews on the various vessels as it employees was of grave importance to the Government and was the subject of "careful study." *Id.* at 798. The General Agent under the G. A. A. contract was expressly declared to be an agent of the United States "and not an independent contractor." *Id.* at 795.

A seaman serving in a vessel which is operated under a G. A. A. contract may not maintain a Jones Act action against the General Agent. The MISSION SAN FRANCISCO

was operated under a different contract, an M. S. T. S. contract.

In the M. S. T. S. contract the master, officers and members of the crew are expressly *employees of Mathiasen* and not of the government. (R. 70a, 90a). The Court of Appeals for the Third Circuit in construing the contract held that Mathiasen was a bareboat charterer entitled to all the privileges of that position and subject to all corresponding duties and obligations. *In Re Petition of United States,* 259 F. 2d 608 (1958). At 609, the Court stated:

> "In it [the agreement] Mathiasen agreed to '. . . equip, fuel, supply, maintain, man, victual and navigate the tankers.' It agreed that all tankers turned over to it '. . . shall be redelivered to the Government in such condition as the Government may specify . . .' It agreed that 'The contractor shall procure all personnel necessary to fill the complement of each tanker . . . the officers and members of the crew shall be subject only to orders of the Master or contractor . . . (and) shall be employees of the contractor at all times and not of the government. . . .' Under the article entitled 'Insurance-Liability to Third Parties', it agreed that 'The contractor shall procure from and maintain with a reputable carrier, approved by the Government, such available insurance as the Government . . . shall direct.' And paragraph (d) of that article reads: 'For the purpose of this Article, all officers and members of the crew of said tankers and of any other ships owned by, or operated by or for, the Government, and any other personnel employed in any capacity by the Government, shall be deemed to be third parties, and not employees of the Government.'"

Caldarola v. *Eckert,* 332 U. S. 155 (1947); *Johnson* v. *Emergency Fleet Corp.,* 280 U. S. 320 (1930); *Green* v. *New York and Cuba Mail S.S. Co.,* 215 F. Supp. 554 (S. D. N. Y. 1962) and *Hanlon* v. *Waterman S.S. Corp.,* 265 F. 2d 206 (2d Cir. 1959), *cert. den.* 361 U. S. 822 (1959), construed different contracts that did not declare that the officers and crew were the employees of the charterer and not of the United States.

Moreover in *Hanlon* v. *Waterman Steamship Corporation, supra,* the Court of Appeals for the Second Circuit stressed that under a G. A. A. contract Waterman did not operate the vessel, but merely furnished officers and men for employment by the United States. In 1870 this Court declared that an owner *pro hac vice* is liable for the torts of the vessel. *Thorp* v. *Hammond,* 12 Wall. 408.

The Court of Appeals for the Fifth Circuit in construing a G. A. A. contract ruled that the exclusive remedy of the plaintiff was against the United States under the authority of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783 (1949). *Atlantic Coast Line R. Co.* v. *Agwilines Inc.,* 195 F. 2d 459 (1952). The Court stressed that the agreement contained no language indicating that the contract was a demise, and it intimated that if the suit were against a bareboat charterer the result would be different when it said at 462:

> "Only one who is owner or owner *pro hac vice,* operating the vessel, is liable for the acts of the master and crew in its navigation and management."

Chowaniec v. *United States,* 149 F. Supp. 251 (S. D. N. Y. 1956), involved an M. S. T. S. contract. There the Government agreed with this petitioner's position. A seaman brought a proceeding in admiralty under the Jones Act

against the United States and the "contractor." In its answer to the libel, the Government as a fifth defense stated:

> "At the times mentioned in the libel, the libelant was employed by Marine Transport Lines, Inc., who operated and managed the U. S. N. S. Tamalpais and accordingly, the United States of America is not a proper respondent."

The Court dismissed the libel against the United States, since it was not negligent, and held the contractor, Marine Transport Lines, liable under the Jones Act.

Congress did not intend that one in the position of Mathiasen be considered an "agent" of the United States within the meaning of the Suits in Admiralty Act. Senate Report No. 2535, 81st Cong. 2d Sess. (1950), 1951 A. M. C. 149-150, states:

> "The bill will not in any way change the existing rights of seamen, under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate, under *bare-boat charter* or similar arrangements, vessels which are merely owned by the Government." [Emphasis supplied].

The draftsmen of the M. S. T. S. contract complied with the intent of Congress by inserting a provision in the contract prohibiting the Contractor from executing an agreement with the members of the crew of the *Mission San Francisco* which differed from the collective bargaining agreement between Mathiasen and seamen serving in other vessels of Mathiasen that were not the subject of an M. S. T. S. contract. Article 5 (d) of the M. S. T. S. contract provides in part:

> ". . . provided, however, the Contractor shall under no circumstances execute separate labor agreements limited solely to the operation of Government owned tankers." (R. 70a-71a).

The crew members of the MISSION SAN FRANCISCO, signed articles which expressly set forth that they were employees of Mathiasen.

The word "agent" contained in Section 745 of the Suits in Admiralty Act is a word of art referring to a general agent in a contract such as the G. A. A. contract. The rules of private agency are not applicable here. This Court in the *Cosmopolitan* case stated at 790-91:

> ". . . [T]he word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied."

The Jones Act was social legislation designed to create a new cause of action. It granted seamen the right to seek redress for injuries. It granted certain relatives of seamen the right to recover for their death.

We respectfully submit that the decision of the Court of Appeals for the Fourth Circuit in *Smith* v. *United States,* 346 F. 2d 449 (1965), *cert. den.* 382 U. S. 878 (1965), should be overruled. The true construction and effect of the M. S. T. S. contract is cogently set forth by Circuit Judge Bell in his dissenting opinion. Judge Bell stated that prior to entering into the M. S. T. S. form of contract the Government was aware of the holding in *Cosmopolitan,* was aware that that decision had been codified in the 1950 amendment to the Suits in Admiralty Act, was aware of the differences between the G. A. A. and the M. S. T. S.

contract, was aware of the decisions in *Hanlon, Atlantic Coast Line R. Co.* and similar cases and yet proceeded to draft a contract differing from the G. A. A. in so many substantial particulars as to take the "contractor" out of the meaning of the word "agent" as expressed in Suits in Admiralty Act. *Smith* v. *United States,* 346 F. 2d 449, 456 (4th Cir. 1965) (Bell, J., dissenting).

The Court's decision in *Powell* v. *U. S. Cartridge Co.,* 339 U. S. 497 (1950), is analogous to this case and is in apparent conflict with the opinion of the Court below. In *Powell,* the Contractor had the same rights and duties as Mathiasen. There as here the contractor was a private corporation operating Government owned property; the parties contracted on cost plus a fixed fee basis; the private corporation was an independent contractor; the contractor was to be reimbursed for all expenses by the Government; the Government reserved large rights of supervision, auditing and inspection; the men operating the Government owned property were to be hired and assigned by the contractor and were to be employees of the contractor. Employees of the United States do not come within the protective provisions of the Fair Labor Standards Act. It was held that the contractor was liable to the workers for over-time wages under the Fair Labor Standards Act.

The Court in *Lindgren* v. *United States,* 281 U. S. 38 (1930), did not hold that the seaman's exclusive remedy was under the Jones Act. It merely held that the seaman's *exclusive remedy against his employer* was under the Jones Act. No prohibition was declared against recovering from another tortfeasor by means of a different legal remedy.

Petitioner did not seek a double recovery. The awards under the Jones Act and under the Delaware Wrongful Death Act did not result in a double recovery, nor was there any overlapping in the awards.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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7 December 1966.